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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PERFORMING RIGHT SOCIETY LIMITED AND SOCIETE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE AS *AMICI CURIAE*

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The Performing Right Society Limited ("PRS") and Societe des Auteurs, Compositeurs et Editeurs de Musique ("SACEM") submit this brief as *amici curiae* urging reversal of the judgment of the Court of Appeals.

INTEREST OF *AMICI CURIAE*

PRS is an association of composers, authors and publishers of musical works that was formed in the United Kingdom in 1914 to administer on behalf of its members certain of the rights provided by copyright legislation. A non-profit organization, it has more than nine thousand British members, and also represents composers and publishers in twenty-six other countries, formerly part of the British Commonwealth, that have no indigenous performing right societies.[1] PRS is affiliated on a reciprocal basis with similar organizations in thirty-seven countries, including the United States.

SACEM, established in 1851, is the world's oldest performing right organization. It has approximately 40,000 French members and represents composers and publishers in twenty-four other countries, formerly part of the French Empire, that have no performing right societies of their own. It is affiliated on a reciprocal basis with similar organizations in over thirty nations, including the United States.

The repertoires of both *amici* and their affiliates are made available for performance in the United States through their affiliation agreements with ASCAP and BMI. Under these agreements, ASCAP and BMI obtain performance rights to different portions of the

[1] These countries are: Barbados, Bermuda, British Virgin Islands, Cayman Island, Cyprus, Gibraltar, Guyana, Hong Kong, Republic of Ireland, Jamaica, Kenya, Leeward Islands, Malawi, Malaysia, Malta, Mauritius, Nigeria, Pakistan, Seychelles, Singapore, Sri Lanka, Tanzania, Trinidad, Uganda, Windward Islands, and Zambia. Jamaican music, in particular, is widely played in the United States.

repertoires of PRS and SACEM for licensing to American users. ASCAP and BMI represent the *amici*'s members and affiliates, and protect their rights against unauthorized performances in this country. Royalties are distributed in accordance with ASCAP's and BMI's usual rules and procedures governing royalty distribution to composers and publishers in the United States.

The affiliation agreements among PRS, SACEM, ASCAP and BMI are part of a comprehensive framework of similar agreements among performing right organizations in nearly forty countries throughout the world. This international structure, which has been in place for over half a century, provides a simple, efficient and equitable method by which foreign composers and publishers may have their works recognized and performed in the United States. Conversely, it also provides a fair and effective means for American composers and publishers to compete for recognition in the United Kingdom, France and other countries and have their works performed abroad on a just and non-discriminatory basis.

The present system is the product of many years' experience in meeting the special needs and problems of international licensing of musical performance rights. Its economic and cultural benefits are immense. Economically, it establishes a world-wide market in which musical compositions freely and effectively compete, unfettered by national boundaries. Culturally, the "common market" for performance rights fosters an unobstructed flow, back and forth, of musical creativity throughout the world.

The linchpin of this international system for the licensing of musical performance rights is the blanket license that has now been held illegal *per se* by the Second Circuit in this case. Blanket licensing by ASCAP and BMI has made the musical repertoires of *amici* and their affiliates in nearly forty countries available in the United

States to all the television networks and their vast audiences, as well as to countless television and radio stations, hotels, restaurants, concert halls, and a myriad of other users. It has been the vehicle for such valuable contributions to the American musical scene as those of PRS members Ralph Vaughan Williams, Benjamin Britten, the Beatles, the Rolling Stones and Elton John, and SACEM artists Michel Legrand, Olivier Messiaen, Dimitri Tiomkin, Jacques Brel and Edith Piaf. No alternative form of licensing could function as fairly and efficiently in making possible such a full and universally beneficial international exchange of performance rights. Destruction of the blanket license would leave an irreparable void in the world of music.

Continued access to the American market, with full opportunity for performances on the television networks, is of great importance to PRS, SACEM, and their affiliates and members. For the year 1977, PRS received payments from ASCAP and BMI for performances of musical works in PRS' repertoire of about $3.3 million and $2.2 million, respectively, or a total of about $5.5 million.[2] In that year, SACEM received a total of approximately $1.2 million from ASCAP and BMI.[3] Payments from ASCAP and BMI accounted for about thirteen percent of PRS' 1977 gross revenues, and a smaller, but still significant, percentage of SACEM's 1977 gross revenues. A substantial portion of PRS' and SACEM's receipts from ASCAP and BMI represents royalties earned by the performance of their repertoires on the television networks under blanket licenses.

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[2] Reciprocally, PRS distributed a total of about $5.3 million to ASCAP and BMI, amounts due for the performance in the United Kingdom of works in their respective repertoires.

[3] In the same year, SACEM distributed a total of approximately $4 million to ASCAP and BMI for performance of their works in France.

PRS and SACEM and their affiliates throughout the world have thus been dealt a shattering blow by the Second Circuit's novel and erroneous interpretation of the Sherman Act outlawing the blanket license as if it were a conventional price-fixing agreement illegal *per se*, serving no purpose except to eliminate price competition. Unless reversed by this Court, that decision will unjustifiably restrict the opportunities of the members of PRS and SACEM and their affiliates to have their works performed on a fair, non-discriminatory and competitive basis in this country. The Court of Appeals seems to have given no thought to the extraordinary and most damaging effect of its Sherman Act ruling upon foreign composers and publishers whose musical works are part of the cultural life of America. Yet its ruling cuts into the heart of the world-wide system of international licensing of musical performing rights—a system that has existed for many decades with the sanction of the Department of Justice and the federal courts, and has functioned equitably and efficiently in promoting the progress of musical arts here and abroad.

ARGUMENT

This Court has been careful to confine *per se* rules to narrow classes of conduct which experience has shown to be so harmful to competition, and so utterly unreasonable and unjustifiable, as to warrant outright, across-the-board condemnation. Just last year, the Court reiterated that the prerequisites for *per se* prohibition of a business practice or agreement are "demanding." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977). Although *per se* rules have the value of predictability and tend to conserve judicial resources in avoiding particularized case-by-case inquiry, "those advantages are not sufficient in themselves to justify the creation of [such] rules," for "[i]f it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an

unintended and undesirable rigidity in the law." *Id.* at n.16. Accordingly, "departure from the rule-of-reason standard must be based on *demonstrable* economic effect rather than . . . upon formalistic line drawing." *Id.* at 58-59 (emphasis added).

Before a business practice may be classified as illegal *per se*, there must be a clear showing, grounded in practical experience and market realities, that leaves no doubt of its "pernicious effect on competition" and its "lack of any redeeming virtue." *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958). Condemnation of conduct as a *per se* violation is an inappropriate short-cut where its "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). Only after examination of its nature, history, purpose, and competitive effect shows that a practice or agreement plainly warrants condemnation as illegal *per se* will this Court so classify it. The Court must "know enough of the economic and business stuff out of which [the practice] emerge[s] *to be certain*," *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) (emphasis added), that its aim and effect are anticompetitive and that the gains to be derived from its outright prohibition will far outweigh the losses.

The Court of Appeals' *per se* proscription of blanket licensing of musical performance rights came after no such necessary inquiry into the "economic and business stuff" out of which this international arrangement emerged. Its abstract and doctrinaire approach is precisely what this Court has repeatedly rejected in cases like *GTE Sylvania*, *National Society of Professional Engineers*, *White Motor*, and many others. Even if, as the Second Circuit asserted without support in the record, the availability of blanket licenses might have some effect

in lessening direct "competition" among composers in "selling" performance rights to their works and "bidding" against each other on the basis of "price", the very language strikes a strange and false note in the real world of commerce in music.

Licensing of musical performance rights throughout the world is not like selling automobiles or bananas. Where, as here, the "economic and business stuff" of the challenged practice shows that it came into being, and has continued so long, for reasons wholly unrelated to any purpose to lessen competition or fix prices; where, whatever its superficial appearance, the essence of the practice is wholly different from price-fixing between competitors in the usual context or market; where it performs undeniably valuable commercial functions in an industry with unique characteristics and needs; and where it has no demonstrable anticompetitive impact but, indeed, has been found by the trial court after full examination to be distinctly procompetitive, categorical *per se* prohibition is surely unjustified.

The decision below enlarges the scope of the *per se* price-fixing rule far beyond the bounds delimited by this Court's decisions and by sound antitrust policy. It illustrates once again how any legal rule, no matter how wise and sensible, can be misapplied once one loses sight of its rationale. The *per se* rule is too valuable and important a tool of antitrust enforcement to be stretched, as it was by the Court of Appeals, so far beyond its proper limits as to jeopardize its continuing vitality and utility.

* * *

Although the District Court specifically upheld the use of blanket licenses after extensive analysis of their competitive impact, the Second Circuit assumed that blanket licensing, because it involves the use of "a single agency with a single price," "dulls the [individual copyright owner's] incentive to compete" and "tampers with price

structures." Appendix to Petition for Certiorari ("App.") at 11a-12a, 20a. This without more, in the Court of Appeals' view, automatically brings blanket licenses within the *per se* rule against price-fixing declared in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

But this Court has never held that a cooperative selling agency, merely because its use may have an effect on prices or price competition is, *ergo*, an illegal price-fixing scheme. Certainly *Socony-Vacuum*, on which the Second Circuit chiefly relied, propounded no such sweeping and simplistic principle. To be sure, the opinion of Mr. Justice Douglas spoke of "price tampering" by sellers who had combined under an agreement to restrict the supply of their product. But the dominant fact in *Socony-Vacuum* was that the sellers' agreement was admittedly aimed at suppressing competition and served no economic purpose except to fix prices. That kind of price "tampering" is price-fixing. It hardly follows that *every* agreement or practice that affects ("tampers with") price is *ipso facto* price-fixing. *Per se* condemnation was clearly warranted in *Socony-Vacuum* since the combination there had the same character, object and result as a conventional price-fixing conspiracy. To read *Socony-Vacuum* literally as making *any* "tampering with" price illegal *per se* is to ignore the factual and legal context in which the Court used the phrase and by which it was limited.

As need not be labored, a rule so rigid and indiscriminate as that announced by the Court of Appeals, if it were taken seriously and applied consistently, would condemn practically every form of concerted economic activity. More than half a century has passed since Mr. Justice Brandeis pointed out that "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board*

of Trade v. *United States*, 246 U.S. 231, 238 (1918). Corporations, partnerships, joint ventures, contractual relationships—all affect competition in some degree and "tamper with" prices in some fashion. If that were enough to bring down judicial *per se* condemnation, no productive unit comprising more than a single individual could survive even the threshold stage of antitrust scrutiny. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (Pt. II), 75 Yale L.J. 373, 377 (1966). The finding of a restraint on the freedom of a trader is the beginning, not the end, of antitrust analysis.

That mere lessening of competition and "price tampering" do not suffice to establish *per se* illegality was confirmed only last term in *National Society of Professional Engineers* v. *United States*, *supra*. There, the Court considered an agreement expressly banning the submission of competitive bids to customers. That agreement obviously suppressed competition and "tampered with" prices. Indeed, the defendants openly acknowledged these effects, as well as the agreement's anticompetitive purpose, and sought to justify the ban on bidding by citing benefits allegedly flowing from diminished price competition in their profession. While concluding that "anticompetitive purpose and effect" were evident "on the face" of the agreement, the Court withheld *per se* condemnation. Instead, the Court held the agreement invalid only after rule-of-reason analysis.

If the rule-of-reason standard was appropriate in *National Society of Professional Engineers*, *a fortiori* it is appropriate here—where, as the District Court found as a fact and the Court of Appeals did not disagree, the blanket licensing of musical performance rights passes full muster under a rule-of-reason analysis. Unlike the engineers' bidding ban, blanket licensing of copyrighted music is not motivated by a need or desire for insulation

from competitive pressures. Rather, it reflects the market's choice of the cheapest and most efficient means of arranging transactions between buyers and sellers in a unique industry. Composers have found it physically and financially impossible on an individual basis to protect against piracy of their copyrighted works. Users have required ready access to a large and changing pool of musical compositions without the risk of copyright infringement, and without the burdens of identifying and negotiating with numerous copyright holders. The blanket license emerged as a pragmatic response to these vital and legitimate commercial needs—not as a device for fixing prices or eliminating price competition. *See* App. at 25a-26a. *See also* Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 Law & Contemp. Prob. 275 (1954).

The benefits of blanket licensing are indisputable; even the Court of Appeals acknowledged that the blanket license may "serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." App. at 22a. In the United States alone, there are over 80,000 composers and publishers holding copyrights in millions of musical works. PRS and SACEM together represent in excess of 50,000 foreign music writers and publishers whose copyrighted compositions also number in the millions. Licensed performances of music in the repertoire of ASCAP alone are estimated at more than 1 billion each year. Comment, *CBS* v. *ASCAP: Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 786 (1978). Without the availability of blanket licensing, the costs of doing business in this vast and unusually complex market—collecting and disseminating information, negotiating licenses, and monitoring performances—would soar so high that the necessary functions could not be accomplished at all.

Certainly there is no alternative form of licensing that would work as equitably and efficiently to facilitate the *international* exchange of musical performance rights. Under either a system of direct licensing by individual copyright holders, or a system of *per use* licensing through ASCAP and BMI, foreign composers and publishers would be placed at a substantial and unfair competitive disadvantage *vis-a-vis* their American counterparts.

Performance rights to many foreign compositions are held by music writers or publishers who have no American representative (except ASCAP or BMI). In such cases, the special problems of transoceanic negotiation—time-zone differentials, language barriers, and other added costs—would pose enormous, probably insuperable obstacles to network use of foreign music under a direct licensing scheme. Moreover, even those composers and publishers having agents in the United States could not make their musical works available at competitive rates while absorbing the expense of compensating such representatives for the additional burdens of direct license negotiation with users. Agent fees already consume between twenty-five and fifty percent of royalties accruing from an American performance and would doubtless rise still higher if direct negotiations were mandated.

Nor would foreign copyright holders have a fair chance under a per use scheme. Assuming such a scheme is feasible at all, it would likewise entail vastly increased transactional costs. It is difficult to understand how, as the Court of Appeals suggested, "ASCAP itself" could "provide some form of per use licensing which will ensure competition among the individual members . . . ." App. at 22a. Would it simply compile and maintain a fee schedule from which the networks would shop? If so, how would such a list (covering millions of works that may be televised in a variety of differing circumstances) be compiled, and how would it be administered if the network,

for example, wanted a musical work only at a below-list price or if either of two works was acceptable depending on the relative prices? If there is no fee schedule, what would ASCAP's role be in situations where the network desires music of a kind for which numerous individual compositions may be suitable?

Patently, a system of per use licensing would at best be grossly inefficient and at worst totally unworkable. In any case, the inevitable result would be to restrict the flow of musical works from foreign composers and publishers into this country. Without blanket licensing, the American performance rights market would thus be effectively insulated against competition from foreign composers and publishers. To bring this about in the name of antitrust would indeed be ironic.

In sum, blanket licensing of musical performance rights differs radically in kind and degree from the practices which this Court has rightly condemned as *per se* illegal, such as price-fixing. It meets none of the established criteria for departure from the rule-of-reason approach that has been the primary mode of antitrust analysis for three quarters of a century. It has not been, nor could it be, demonstrated that the use of blanket licenses is devoid of "any redeeming virtue." *Northern Pacific Railway* v. *United States*, *supra*, 356 U.S. at 5. On the contrary, all of the available evidence supports, if not compels, the District Court's finding, undisturbed by the Court of Appeals, that blanket licensing of musical performing rights serves vital and beneficial procompetitive functions.

The Court is not confronted here, as it was in *Socony-Vacuum* or even in *National Society of Professional Engineers*, with a practice whose only "justification" is framed in terms of alleged "benefits" to be gained by suppressing competition. In this case a factual record was made in the District Court that blanket licensing of music, in stark

contrast with the arrangements involved in those cases, was developed to provide, and does provide, significant economic benefits wholly apart from any incidental effect it might theoretically have on "price competition" among individual composers each selling directly to networks—a non-existent and unreal kind of "competition." Even the Second Circuit concluded that blanket licensing is "not simply a 'naked restraint' ineluctably doomed to extinction," and that "*[t]here is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need* for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." App. at 22a (emphasis added).

Nor is there any basis in experience for the Court "to be certain," as the doctrine of *per se* illegality requires, that the effect of blanket licensing is so "manifestly" and "perniciously" anticompetitive that this demonstrably efficient business practice—the product of a half century's experience—should be outlawed in every case, without inquiry into the particular circumstances. *See White Motor Co.* v. *United States*, *supra*, 372 U.S. at 263; *Northern Pacific Railway* v. *United States*, *supra*, 356 U.S. at 5. The Court of Appeals simply assumed that even though composers and publishers retain the right to license their works directly, the mere existence of blanket licenses "provides a disinclination to compete." App. at 22a. But that assumption was contrary to the decision of the District Court—whose factual findings the Second Circuit accepted—specifically upholding blanket license use after elaborate inquiry into its competitive impact. Moreover, as already noted, the Court of Appeals completely overlooked the decidedly procompetitive effect of the free flow of foreign musical compositions into the United States that the blanket licensing system has for so many decades made possible.

Finally, the inappropriateness of banning the blanket license *per se* is tacitly confirmed even in the Second Circuit's own decision. The decision below, as almost all commentators have noted, is internally inconsistent and contradictory. *See, e.g.*, Comment, *The Middleman as Price Fixer: Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 91 Harv. L. Rev. 488 (1977); Comment, *CBS* v. *ASCAP: Performing Rights Societies and The Per Se Rule*, 87 Yale L. J. 783, 796-801.

Apparently attempting to compensate for the obvious defects of its inflexible rule, the Court of Appeals invented a novel exception to the *per se* price-fixing rule, allowing use of blanket licenses in cases of "market necessity." That the court below felt obliged to carve out such an "exception" reflects the error of its ruling on the merits. The very essence of a *per se* rule is that it does not allow for "exceptions" in particular cases. As a law review comment points out, "[t]he court's need to create an exception to the price-fixing rule clearly reveals the deficiencies in its view of price fixing . . . . If the court had recognized that the productive nature of an enterprise is relevant to an evaluation of its pricing effects, it would not have confronted a situation in which it felt called upon to create an exception." Comment, *The Middleman as Price Fixer: Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 91 Harv. L. Rev. 488, 497 (1977) (footnote omitted).

The same is true of the Court of Appeals' approval, in dealing with the remedy, of per use licensing by ASCAP and BMI. Such a scheme would involve precisely the same conduct—use of a "single agency with a single price"—that the court held to be the vice of the blanket license. *See id.* at 491-92, n.26 (observing not only that the remedy suggested by the court below is inconsistent with its theory of antitrust liability, but that per use

licensing actually "departs farther from the competitive ideal than the blanket license" by creating an incentive to reduce use). If blanket licensing is a *per se* violation, it would have to be banned across-the-board, rather than outlawed only in some instances or replaced by another form of licensing containing the same alleged vice. That is the *raison d'etre* of a *per se* rule. To conclude, as did the Second Circuit, that blanket licensing or a legally analogous scheme may be warranted in certain circumstances is to concede that there is no basis for condemning it as a *per se* violation. It is to concede also the correctness of the District Court's findings and conclusion, upon exhaustive examination of the facts, that the blanket licensing of musical performance rights is valid under a rule-of-reason standard.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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